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No. 424

IN THE

Supreme Court of the United States

October Term, 1963

ORKIN EXTERMINATING COMPANY, INC.,
Appellant

v.

GULF COAST RICE MILLS, *Appellee*

MOTION TO DISMISS

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v.
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MOTION TO DISMISS

The appellee Gulf Coast Rice Mills moves to dismiss the appeal on the grounds that the judgment rests on adequate, non-federal basis, that no federal question was raised or preserved below, that the Texas state court did not rule on the late federal claim, that the issue is moot, and that the appeal was docketed out of time.

OPINION BELOW

The opinion below is reported at 362 S.W. 2d 159. See Appendix A.

JURISDICTION

1. *The judgment rests on adequate non-federal basis, because the judgment would be the same under state pure food statutes alone, or under city pure food ordinances alone.*

The judgment is based upon adequate and independent non-federal grounds, being the pure food laws of the State

of Texas and the City of Houston. *Texas Penal Code (Vernon's)* Articles 706, 707, 717. *Texas Revised Civil Statutes (Vernon's)* Articles 4466, 4470-4472. *City of Houston Code*, Section 861-880 (Plf. Ex. 26; S.F. 362-380).*

Breaches of the state law and city ordinances on food adulteration were pleaded by the rice mill as being violated and causing its damages. (Tr. Vol. II, pp. 4-6, 8-9)** Proof of their violation was made and is in the record. (S.F. 44, 45, 245, 233-235, 287, 281, 304-305, 309-310, 314-315, 295-297, 299, 75, 401-402) The jury found facts showing their violation and damages resulting therefrom by its answers to Special Issues No. 2 through 7, inclusive. (Tr. Vol. II, pp. 49-50) The trial court found that there was proof showing violation of the State food statutes and violation of the city food ordinances by submitting issues upon whether the Lindane poison may have rendered the rice injurious to health, and by refusing the exterminating company's motion for judgment non obstante veredicto. The Texas Court of Civil Appeals found that the jury's finding, being Special Issue No. 2, has support in the evidence. The Texas Supreme Court has concurred with those findings and the breaches of state and city laws by refusing to grant an application for writ of error.

Both the state statute and the city ordinance provide that food is adulterated if it contains any added poisonous

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*S.F. refers throughout to the Statement of Facts, the record which has been filed herein.

**TR. refers throughout to the Transcript.

or deleterious substance which may render it injurious to health.

In the opinion below at 362 S.W. 2d, the Court of Civil Appeals points out at pages 163, 164 the pleadings that the state law was violated and that the city law was violated. At page 164 the Court then says:

> ". . ., there is nevertheless evidence showing that a number of samples were taken and that the results of many samplings showed from 0.2 to 3.6 parts per million of Lindane, and that the addition of such parts of Lindane to milled rice may render it injurious to health."

The finding that the Lindane application may render the rice injurious to health constitutes adulteration of the food under both the state statutes and the city ordinances.

At page 165 of the opinion, the Texas Court of Civil Appeals holds that the application of Lindane by the exterminating company had adulterated the rice and rendered the rice mill partners subject to criminal prosecution and punishment under both the state statutes and the city ordinances.

Even if the Federal Food, Drug & Cosmetic Act had not been pleaded and violations theerunder proven, the judgment below would have been the same under either the State of Texas pure food law alone, or under the City of Houston ordinances alone.

A state court judgment will not be reviewed when based upon adequate, independent, non-federal grounds. *Fox Film Corp. v. Muller*, 296 U.S. 207, 209, 210.

2. *A fact issue being the only question preserved, will not be reviewed because its determination was for the jury and state courts.*

A fact question was the only question preserved for appeal by the exterminating company. It was whether there was any evidence to support the jury verdict.

Under procedure in the state court of Texas, a party may appeal from the overruling of his motion for judgment non obstante veredicto alone, without moving for a new trial. Rule 324, *Texas Rules of Civil Procedure*. However, where a party elects to appeal from the denial of motion for judgment non obstante veredicto, he is limited on appeal solely to the alleged error in overruling such motion and the points raised therein. Any other claim or complaint is waived. Rule 324, *Texas Rules of Civil Procedure*. *Freed v. Bozman*, 304 S.W. 2d 235, 241; *Trice Production Co. v. Dutton Drilling Co.*, 333 S.W. 2d 607, 616, 617.

The exterminating company did not present in its motion for judgment non obstante veredicto any question or complaint of a constitutional nature, or of application of any law, federal, state or city. The exterminating company's only complaint was that there was no evidence to support the judgment. That sole point which was preserved has been determined against the exterminating company by the jury, the trial court, the Texas Court of Civil Appeals and the Supreme Court of the State of Texas. There is such evidence in the record and it has been found sufficient. (S.F. 42-49, 51-52, 74-77, 245, 258, 295-297, 299-315, 362 S.W. 2d 159 at 163-166.)

Jurisdiction is not exercised to review a decision of the jury and state courts upon a question of fact. *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160. Seventh Amendment, United States Constitution.

3. *There is no basis for appeal because the validity and constitutionality of statutes were not drawn in question not being mentioned until after the appellate opinion was rendered.*

The validity or constitutionality of statutes were not drawn in question in the state court proceedings, as required by Section 1257, 28 U.S.C.

The exterminating company did not plead or present any question on validity or unconstitutionality in the trial court, either before or after judgment. Further, it did not present such question in any form upon appeal to the Court of Civil Appeals.

It was not until after rendition of the opinion on appeal that the exterminating company for the first time, by way of motion for rehearing, questioned validity or constitutionality.

Thus, validity was not "drawn in question", and no right, privilege or immunity was "specially set up or claimed", as required by Section 1257 of 28 U.S.C. *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390, 391.

4. *There is no basis for appeal because no federal question was raised in the state court, the first federal complaint being by motion for rehearing after the appellate opinion was rendered.*

Rule 279 of *Texas Rules of Civil Procedure* provides in part as follows:

> "Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; . . ."

The exterminating company first attempted to raise a question of validity or constitutionality by rehearing after the decision on appeal. A complaint made for the first time by motion for rehearing in the Texas Court of Civil Appeals will not be considered. *Quinn v. Wilkerson*, 195 S.W. 2d 399, 404; *Herndon v. Georgia*, 295 U.S. 441, 443; *Radio Station WOW v. Johnson*, 326 U.S. 120, 128.

5. *There is no basis for appeal because there was no Texas state court ruling on the late constitutional claims.*

No federal claim or complaint was made until after rendition of the decision complained of, and the state court opinion is completely silent on the late constitutional claims. Under these circumstances, jurisdiction should be declined. *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 309. It is presumed that the silence is due to the procedural deficiency. *Bailey v. Anderson*, 326 U.S. 203, 206-7.

6. *There is no ground to permit the exterminating company to inject constitutionality after appeal because there was no surprise.*

The exterminating company recognizes that it did not attempt to raise any federal question until motion for rehearing after the opinion of the State appellate court was entered. Although the exterminating company has actively litigated this suit since 1957, it now attempts to obtain review by claiming surprise.

There was no surprise for the following, among other, reasons:

(a) The city, state, and federal health authorities notified the exterminating company's manager in person immediately following this occurrence in 1955 that any amount of the poison Lindane contaminated and adulterated the rice. (S.F. 63-64, 74-78)

(b) The rice mill's pleadings on file for several years before trial specially alleged in detail and by sections the particular city ordinances, state statutes and federal statutes that were violated. The manner and circumstances under which they were violated were pleaded, including violation of the Federal Food, Drug, & Cosmetic Act by the application of any amount of Lindane poison, and violations of city and state food laws by addition of the Lindane poison to the milled rice so that it may be rendered injurious to health. (Tr. Vol. II, pp. 4-6, 8-9)

(c) Voluminous pre-trial depositions and discovery procedures were exhausted, so that the exterminating company was fully apprised of the rice mill's position, and how it charged food laws were violated and the exterminating company was negligent.

(d) As pleaded and proven by the rice mill, the trial court ruled that the application of any amount of Lindane poison to the milled rice violated the Federal Food, Drug, & Cosmetic Act, 21 U.S.C., Section 324(a)(2). This ruling was known to the exterminating company during trial, before submission of the charge to the jury and before entry of the judgment. No complaint of application, validity or constitutionality was made in either the trial court or on appeal to the Texas Court of Civil Appeals.

(e) Regarding application and constitutionality of the "may render injurious" provisions in the city, state, and federal laws, the trial court submitted to the jury a special issue on this fact question (Special Issue No. 2), together with appropriate instructions thereon taken directly from *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399. The exterminating company made no complaint of validity, application or constitutionality in the trial court, either before or after judgment, nor on appeal to the Texas Court of Civil Appeals.

(f) The judgment and opinion in the trial court and state appellate court found that there was evidence supporting violation of city, state, and federal laws, as the rice mill had been pleading and urging for 4 years before this trial.

There was no surprise.

Federal questions were not claimed in the state courts until petition for rehearing in the appellate court, which is too late. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128.

7. *There is no basis for appeal because there is no controversy; further, the issue is moot.*

The occurrence made the basis of this suit was a single, isolated episode in 1955. The determination of this suit will decide nothing insofar as the public is concerned.

The record indicates that the exterminating company used the poison, Lindane, only this one time. The opinion below, 362 S.W. 2d 159 makes this finding at p. 164:

"... The evidence and the record before us show that Lindane was not required in the production of

> rice and that its use could have been avoided. Indeed, Lindane had been used only once in connection with appellee's mill from 1940 to 1955, and then it was used without the knowledge of the appellee or the health authorities. From the time of the application in August, 1955 Lindane has not been used down to the date of the second trial in 1961."

Thus, the record reflects that the exterminating company only once used the poison Lindane on milled rice and has not used it again since 1955. Its use for this purpose is wholly unnecessary and insects are controlled without it.

The issue, so far as the public and the industry are concerned is moot. This case itself would be moot, except for the requirement of payment for the damaged rice by the insurance carrier of the exterminating company. By written contract the exterminating company and the rice mill agreed that this insurance would be carried. (Plf. Ex. 1-A, Section H. S.F. 19-23).

Jurisdiction is not exercised to rule upon an isolated episode of academic interest. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79; *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393.

8. *The appeal has not been perfected because it was docketed out of time.*

The appeal should be dismissed because it has not been timely made.

Rule 13(1), Rules of the Supreme Court, requires that the case be docketed not more than 60 days after the filing of the notice of appeal. The notice of appeal was filed on

July 1, 1963. The time for docketing the case expired on August 30. The case was docketed thereafter on August 31, 1963.

No application for enlargement of time was sought before expiration of the 60 day period. No enlargement of time was obtained.

The appeal, not being taken in conformity to the rules, should be dismissed. Rule 16(1)(a), Rules of the Supreme Court.

QUESTIONS PRESENTED

1. Whether, after the exterminating company had made a heavy application of pesticide containing the toxic and deadly poison, Lindane, directly to milled rice ready for consumption, and the jury found negligence, as well as breaches of city, state and federal food laws, the trial court and both state appellate courts were wrong in refusing to set aside the judgment as being unsupported by any evidence?

2. Whether the exterminating company may now urge constitutional claims, when it did not mention constitutional claims in the trial court, when it did not mention constitutional claims in the state appellate court until after the opinion was rendered, when the state court has not ruled upon these late claims, and when there was no surprise to the exterminating company by the opinion because the city, state and federal food laws and their application had been pleaded specifically?

Challenges To Appellant's Statement of Questions.

Besides the objection that the exterminating company's "questions presented" were not "presented," the questions stated are subject to these additional objections:

(a) The state court in the opinion below did not construe the state and city pure food laws as prohibiting "any" amount of the poison Lindane. Such holding is unnecessary to the decision. The Texas Court of Civil Appeals did hold that there was support in the evidence for the jury's finding that the application of the poison by the exterminating company to the milled rice may have rendered the rice injurious to health. That finding and holding sufficed to show violations of both state statutes and city ordinances under their "may render injurious" provisions. The additional statement that there was substantial evidence showing that Lindane in "any" quantity on rice may render it injurious to health was not necessary to support the judgment, but shows that there was evidence in the record of Lindane being so toxic and dangerous that any amount on milled rice may be injurious. (S.F. 295, 296, 299, 303-306, 309-310)

(b) There is no conflict between the city and state laws and the federal regulations. The "may render injurious" provision of the state and city laws are virtually identical to the "may render injurious" provision of the federal act. 21 U.S.C., Section 342(a)(1). The federal regulations did not provide that "such food", here milled rice, may contain up to 10 parts per million of Lindane. The tolerance was only established upon certain fruits and vegetables where use was necessary to production, where the poison would be dissipated, and where it would be washed or otherwise removed before consumption. Such tolerance was available only upon raw agricultural commodities, unmilled commodities, and was not granted for Lindane upon milled rice.

(c) The federal regulations do not sanction the use of Lindane on milled rice in any amount.

STATUTES, ORDINANCES AND REGULATION INVOLVED*

1. *City Ordinances.*

The city health ordinances involved are Sections 861-880, City of Houston Code (Plf. Ex. 26; S.F. 362-380). Section 868 provides in part as follows:

"Sec. 868. Adulterated Articles.

For the purposes of this article, an article shall be deemed adulterated: ***

(c) Food. ***

(5) If it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health; . . ." (Plf. Ex. 26; S.F. 362, 366-368.)

2. *State Statutes.*

The state health statutes involved are Texas Penal Code (Vernon's Articles 706, 707, 717; and Texas Revised Civil Statutes (Vernon's) Articles 4466, 4470, 4471, 4472.

Article 707, Texas Penal Code (Vernon's) provides in part as follows:

"Article 707. 'Adulterated'.

For the purposes of this chapter an article shall be deemed to be adulterated: ***

(c) In the case of food: ***

(5) if it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health, . . ."

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*All citations throughout are for the year 1955

3. *Federal Statutes.*

The pertinent federal statute is the Federal Food, Drug, & Cosmetic Act, 21 U.S.C., Sections 301 et seq., especially Section 342,(a)(1) and (2), as they appeared in 1955. (Plf. Ex. 28; S.F. 421-423.)

Section 342(a)(1)(2) then provided in part as follows:

"Section 342. *Adulterated Food.*

A food shall be deemed to be adulterated —

(a) Poisonous, insanitary, etc., ingredients.

(1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health, but in case the substance is not an addded substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or (2) if it bears or contains any added deleterious substance, except a pesticide chemical in or on a raw agricultural commodity, which is unsafe within the meaning of section 346 of this title, or if it is a raw agricultural commodity and it bears or contains a pesticide chemical which is unsafe within the meaning of section 346a (a) of this title; . . ."

4. *Federal Regulation.*

The pertinent federal regulations is 21 Code of Federal Regulations, Section 120.1(e), which provided as follows:

"Sec. 120.1 Definitions and interpretations. ***

(e) Raw agricultural commodities include, among other things, fresh fruits, whether or not they have been washed and colored or otherwise treated in their unpeeled natural form; vegetables in their raw or natural state, whether or not they have been stripped of their outer leaves, waxed, prepared into fresh green salads, etc.; grains, nuts, eggs, raw milk, meats, and similar agricultural produce. It *does not include* foods that have been *processed*, fabricated, or manufactured by cooking, freezing, dehydrating, or *milling*." (Emphasis added)

STATEMENT

The rice mill and the exterminating company entered a written contract whereby, for monthly payments, the exterminating company agreed to control insects and rodents, and to use only materials allowed by law and acceptable to the industry. (Plf. Ex. 1-A, Secs. A., B., C.; S.F. 12-16)

The appellee is a long-established rice mill business. A rice mill has been operated on its premises continuously since 1913, and partner R. L. Williams has operated the mill there since 1935. (S.F. 239-242) In the 1950's, the mill's average sales were about $4,000,000 per year. (S.F. 242)

Since there was great danger in the application of poisonous insecticides directly to the processed foodstuff, rice, (Plf. Ex. 15; S.F. 249), the mill paid for and the exterminating company contracted to carry public liability insurance in the amount of $250,000/$500,000, contractor's liability insurance in the amount of $250,000 $500,000, and property damage insurance in the amount of $100,000 (Plf. Ex. 1-A, Sec. H; S.F. 19-23).

In the latter part of 1955 the exterminating company permitted insects and rodents to become completely out of control. (S.F. 65-68, 134-140, 261, 266).

In August, 1955, the exterminating company made a heavy application of pesticide containing the poison Lindane, to the entire stores of rice, the mill and the warehouse. There was approximately $1,000,000 worth of rice poisoned. (S.F. 42-48, 51-52, 74-77, 245, 258)

Lindane is the common name for the gamma isomer of benzene hexachloride. It is poisonous and toxic. It can cause death in humans. (S.F. 296-297, 306, 309-310).

To remove the Lindane poison the rice mill had to remill rice and thoroughly clean the premises. Over 3,000,000 pounds had to be remilled. The rice mill was out of the market for three months at the height of the season. This was at great expense to the rice mill. (S.F. 57, 74-77, 120-132, 384-386, 393-394, 397-399).

This suit is for damages to milled rice only, which had to be remilled to remove the poison contamination. (S.F. 42-47, 76-77, 119, 232, 401-402).

The heavy application of the poison was discovered and a meeting was held by representatives of the city health authorities, state health authorities, federal health authorities, the rice mill and the exterminating company. (S.F. 47-52, 63-64, 69-78). All food and drug agencies, city, state and federal, notified the rice mill and the exterminating company that the rice was adulterated by the Lindane poison, and that it could not be sold, offered for sale, or moved in commerce. (S.F. 47-52, 63-64, 69-78, 408-409). The rice mill was notified that it would be subjected to civil

and criminal provisions of the law. (S.F. 276-282, 401-402, 408-409). 362 S.W. 2d 159 at 165.

The Director of the Texas State Division of Food and Drugs testified that the state agency was prepared to take action by filing suit, obtaining a restraining order and exercising the seizure provisions of the Texas food law. (S.F. 277-282).

The Texas pure food statutes provide that food shall be deemed adulterated if it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health. The Texas statutes also provide for seizure, destruction, civil and criminal penalties. Texas Penal Code (Vernon's), Articles 706, 707, 717. Texas Civil Statutes (Vernon's), Articles 4466, 4470, 4472.

The City of Houston had in effect ordinances containing similar provisions for adulteration by added poisonous or deleterious ingredients which "may render such article injurious to health." The ordinances contained other provisions making violation an offense subject to fine and subjecting the food to seizure and destruction. City of Houston Code, Sections 861-880. (Plf. Ex. 26; S.F. 362-380).

There is abundant evidence in the record that the Lindane poison adulterated the milled rice. This testimony was received from a medical doctor specializing in poisons, from a qualified biochemist, from the Director of the Texas State Division of Food and Drugs, as well as from others. (S.F. 295-297, 299, 304-305, 309-310, 315, 74-77).

The jury found as a fact that the application of the poison Lindane to the rice may have rendered it injurious to health. That there is evidence in support of that finding

has been upheld by the trial court, the Court of Civil Appeals and the Supreme Court of the State of Texas.

The occurrence made the basis of this suit, the application of the poison Lindane to the milled rice, represents a single, isolated occurrence. To the knowledge of the rice mill, Lindane had never previously been applied to its rice. This is the only instance where it was discovered by health authorities. Since the occurrence in August, 1955, Lindane has not been used again. 362 S.W. 2d 159 at 164. The use of Lindane poison in production of rice is demonstrated to be unnecessary and undesirable.

SUMMARY OF ARGUMENT

The judgment sought to be reviewed was correctly determined. The "may render injurious" provisions of city and state food laws, as well as the federal act, were applied and interpreted in accordance with the Supreme Court's decision in the *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399.

The Supreme Court decision in the *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, which was followed here, precludes any question. There is no conflict of decisions, but rather established law has been followed.

The decision of this case has no significance to other litigants or to the public. The record shows that during 21 years of rice mill operation, both before and after the incident made the basis of this suit, the insecticide containing the poison Lindane was applied only one time. There is no significance in the case to the nation or to the public, and would not arise again between these parties or in the industry.

The only issue preserved by the exterminating company for review was a fact question of whether there was any evidence to support the jury findings. The jury determination of fact and the evidence supporting it has been confirmed by the state trial court and two state appellate courts.

ARGUMENT

1. *The judgment below was clearly correct because violations of city, state and federal food laws were shown.*

The exterminating company by its written contract agreed to use only pesticides which conformed to state, city and federal law, and which were acceptable to the industry. (Plf. Ex. 1-A, Sections A., C 1; S.F. 12, 13, 15). It also contracted to minimize the possibility of citation by the Food and Drug Administration. (Plf. Ex. 1-A, Sections B. 1., 2; S.F. 13).

The exterminating company made an extremely heavy application of insecticide containing the poison Lindane to the entire stores of rice, the mill and the warehouse. The poison was in a dust carrier, was applied by a power driven blower, and there was no part of the rice or mill which was not covered by Lindane. (S.F. 42-49, 51-52, 74-77, 245, 258, 291-295, 299).

The City of Houston ordinances provided that a food is adulterated and unfit for sale if it contains any added poisonous or deleterious ingredient "which may render such article injurious to health." *City of Houston Code*, Sections 861-880 (Plf. Ex. 26; S.F. 362-380).

The state food and drug statutes contained similar "may render injurious" provisions, with attendant civil

and criminal penalty provisions. Articles 4466, 4470, 4471, 4472, *Texas Civil Statutes (Vernon's)*. Article 706, 707, 717, *Texas Penal Code (Vernon's)*.

The Federal Food, Drug, & Cosmetic Act likewise had a "may render injurious" provision that food is adulterated if it contains any added poisonous or deleterious substance which may render it injurious to health. 21 U.S.C., Section 342(a)(1). (Plf. Ex. 28; S.F. 423)

The jury found that the application of Lindane to the rice may have rendered it injurious to health. (Special Issue No. 2, Tr. Vol. 1). There is abundant evidence in support of this finding. There is the testimony of a medical doctor, who is a specialist in poisons and a professor of internal medicine. His testimony is at S.F. 299-310. There is the testimony of a biochemist who was familiar with Lindane and its effect upon humans. His testimony is at S.F. 311-315. There is the testimony of the Director of State of Texas Food and Drug Division, who is a registered pharmacist and chemist. His testimony is at S.F. 269-282, 291-299.

The trial court has found evidence supporting this verdict by his submitting the issue to the jury and entering judgment upon the verdict. The Texas Court of Civil Appeals has expressly found evidence supporting the verdict. See opinion below, 362 S.W. 159 at 163-165.

The judgment was correctly entered upon violations of the "may render injurious" provisions of the city ordinances, state statutes and the federal act.

In addition to the state and city law violations, there is an independent federal ground to support the judgment.

The Federal Food, Drug, & Cosmetic Act prohibits any amount of Lindane upon milled rice. 21 U.S.C., Section 342(a)(2). That section provided that a food is adulterated "if it bears or contains *any* added poisonous or added deleterious substance, except a pesticide chemical in or on a raw agricultural commodity, which is unsafe within the meaning of section 346 of this title, or if it is a raw agricultural commodity and it bears or contains a pesticide chemical which is unsafe within the meaning of section 346a (a) of this title." (Emphasis added.)

By definition, milled rice is not a raw agricultural commodity and the exceptions in this section do not apply. 21 C.F.R., Sec. 120.1(e). It therefore was adulterated because it contained *any* amount of added poisonous or added deleterious substance, namely Lindane.

The trial court correctly found this to be a violation, as shown by submission of Special Issue No. 1 to the jury on whether the Lindane application was a proximate cause of the damages, not predicated upon any prior finding.

The Court of Civil Appeals opinion correctly found that the application of any amount of Lindane poison to the milled rice violated this section. 362 S.W. 2d 159 at 164-165.

The case has been correctly decided and does not require review.

2. *There is no substantial question because the outcome here will be immaterial to the public and the industry.*

The act of the exterminating company giving rise to this suit, being the application of the poison Lindane to

milled rice in 1955, was an isolated incident. See the opinion below, 362 S.W. 159 at 164. The decision will not affect any other parties and, indeed, will not affect even these parties in the future since there is no occasion for it to recur.

For the 6 years of this litigation the fiction has been preserved throughout that the exterminating company is the party at interest contesting the outcome. This gives it the appearance of a controversy over the use of Lindane on milled rice.

The fact is that its insurance carrier has been the litigant throughout, and this use of Lindane is immaterial to the exterminating company.

There being no necessity for using Lindane on milled rice, the outcome of this litigation will determine nothing so far as the public or the industry is concerned.

The decision here determines this single incident, and jurisdiction is not exercised for a single episode. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74.

3. *There is no substantial question because the issue is foreclosed by the Supreme Court decision.*

The interpretation to be given to the "may render injurious" provision of the federal act was established by the Supreme Court in *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399.

The trial court in submitting its issue to the jury carefully set out by accompanying instruction the interpretation to be given to the term "may render injurious", taking the instruction almost verbatim from the Supreme Court's

opinion in the *Lexington Mill* case. See charge to the jury, Special Issue No. 2 with instruction, at Tr. Vol. I.

In view of this long established construction by the Supreme Court, there is no substantial question or controversy, and jurisdiction should be denied. *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311; *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390.

4. *There is no question for review because long settled Supreme Court interpretation has been followed.*

There is no conflict between the case at bar and the decisions of this Court. To the contrary, the decision of the Supreme Court in *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, was recognized and applied by the trial court, including its incorporation in the charge to the jury. The Court of Civil Appeals in its opinion has recognized and applied this decision. 362 S.W. 2d 159, 163.

The Supreme Court decision has been followed and there is no conflict to review.

5. *The only issue preserved for appeal, a fact issue, should not be reviewed because the facts found have had the concurrence of jury, trial court and two Texas state appellate courts.*

The exterminating company did not make any complaint of the judgment other than by motion for judgment non obstante veredicto. Its appeal was solely upon denial of that motion, and it raised only one question, whether there was any evidence to support the verdict and judgment. Any other question was waived for appeal. Rule 324, *Texas Rules of Civil Procedure*, 362 S.W. 2d 159, 163-164.

The jury determined the facts against the exterminating company. The trial court and the Court of Civil Appeals have found that there was evidence supporting the verdict. 362 S.W. 2d 159, 163-164. The Texas Supreme Court has refused review, stating "no reversible error."

These determinations are binding. The Seventh Amendment to the Constitution of the United States provides that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law."

Where the jury's determination of fact has received concurrence of the trial court and the appellate courts, the Supreme Court does not undertake review. *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275.

6. *The state food statutes and the city food ordinances are effective because the federal government has not pre-empted food regulation.*

The federal government has not pre-empted the regulation of food sanitation. All 50 states of the Union have and apply their own pure food and drug acts. See Vol. 3 CCH Food, Drug, & Cosmetic Law Reporter.

The exterminating company has cited two cases under its pre-emption argument. *Oregon-Washington R. & N. Co. v. Washington*, 270 U.S. 87; and *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148. Neither is applicable here. The former case is on pre-emption in a limited aspect of the quarantine field, and the latter case regards pre-emption by the federal government of the interstate transportation and sale of renovated butter made from packing stock butter.

It was early held that the state acts were valid and enforceable as against the argument of federal government pre-emption. *Hebe Co. v. Shaw*, 248 U.S. 297, 303, 304; *Corn Products Refining Co. v. Eddy*, 249 U.S. 427.

CONCLUSION

We respectfully submit that the judgment rests on adequate, non-federal basis, that no federal question was raised or ruled upon, that there is no substantial question, that the fact issue was correctly decided, and that the appeal should be dismissed.

Respectfully submitted,

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September 24, 1963

APPENDIX "A"

ORKIN EXTERMINATING COMPANY, INC.,
Appellant,
v.
GULF COAST RICE MILLS, Appellee

No. 13998.

Court of Civil Appeals of Texas

Houston.
Nov. 8, 1962.

Rehearing Denied Nov. 29, 1962.

WERLEIN, Justice.

This suit was brought by plaintiff, Gulf Coast Rice Mills, against Orkin Exterminating Company to recover damages allegedly growing out of breach of contract and negligence of the defendant. Both plaintiff and defendant have perfected appeals to this Court from the judgment rendered by the trial court on the second trial of the case. From the judgment of the District Court rendered on the first trial, an appeal was taken by the defendant and the judgment was reversed and the cause remanded by the Waco Court of Civil Appeals. Orkin Exterminating Company, Inc. v. Gulf Coast Rice Mills, Tex.Civ.App., 343 S.W.2d 768, dism. w.o.j.

A summary of plaintiff's pleadings, which were identical on both trials, is given in the opinion of the Waco Court We quote from such summary as follows:

> "Plaintiff alleged that it entered into a written contract with Orkin in 1952 under the terms of which

Orkin was to exterminate and control insects, rodents, and pests in plaintiff's mill; that in August, 1955, Orkin sprayed plaintiff's mill with an insecticide or pesticide known as Lindane; that Lindane is poisonous and prohibited by law to be so used; that the application of Lindane to the mill rendered the rice unusable; that the use of Lindane on the interior of the mill was negligence; caused the rice to be unfit for use and adulterated; caused the Federal authorities to prohibit sale of the rice; caused the rice to be injurious to health and unsafe within the meaning of the Federal Food and Drug Act. 21 U.S.C.A. § 301 et seq.; that the foregoing were proximate causes of damages suffered by plaintiff which were alleged to be some $96,000 (expense for remilling the rice and loss of profits incurred while so remilling the rice.)"

The plaintiff also alleged violations of certain provisions of the laws of the State of Texas and ordinances of the City of Houston, and pled that Orkin had defaulted and breached its contract in some 17 particulars. These breaches are summarized in the opinion of the Waco Court of Civil Appeals. That Court on the record before it held that the trial court erred in granting the partially instructed verdict for the plaintiff, thereby withdrawing from the jury any issues as to whether defendant breached its contract, or defaulted upon its express or implied warranty, since there were numerous disputed fact issues in the contract and breach of warranty phases of the contract. With respect to the tort phase of the case, the Court held that the record did not support any recovery.

On the second trial, the court overruled plaintiff's and defendant's motions for an instructed verdict, and submitted the case on seven special issues to which the jury

found in substance; (1) that the application of Lindane in August, 1955, to the rice and premises of plaintiff was a proximate cause of damages sustained by plaintiff; (2) that such application to the rice may have rendered it injurious to health; (3) that such application was a proximate cause of plaintiff's damages, and (4) was negligence; (5) that such negligence was a proximate cause of plaintiff's damages; (6) that $27,790.07 was the sum of money that would fairly and reasonably compensate plaintiff for such damages as were caused by application of Lindane to the rice and premises of plaintiff, taking into account (a) cost of remilling the rice, (b) cost of cleaning plaintiff's premises and (c) difference between reasonable market value of rice before and after remilling, directly resulting from the application of Lindane in August, 1955; and (7) that $15,000.00 would fairly and reasonably compensate plaintiff for such damages as were directly and proximately caused by loss of use of plaintiff's mill reasonably and necessarily consumed in remilling the milled rice.

The trial court on hearing defendant's motion for judgment non obstante veredicto, reduced the jury's finding of $27,790.07 in answer to Special Issue (6) to $21,245.32 because plaintiff's pleading limited such items of damages to that amount, and otherwise overruled such motion and entered judgment for plaintiff in the total sum of $36,246.32, being the reduced amount of the verdict plus $1.00 nominal damages for breach of contract insurance provisions.

Orkin contends that the trial court erred in overruling its motion for an instructed verdict and judgment non obstante veredicto when there was no evidence to support

any cause of action or legal theory of recovery, and the law of the case and the evidence showed that the record did not support recovery on the tort phase of the case. Orkin states that the statement of the nature of the case on pages 768-772 of the opinion of the Waco Court is correct and it adopts the same. It asserts that the pleadings and evidence were the same in both trials, except for defendant's additional allegation as to the law of the case made in its third amended original answer filed subsequent to the opinion handed down by the Waco Court. The Waco Court's summary of the evidence adduced on the first trial is as follows:

> "The record reflects that plaintiff Rice Mills entered into a written contract with defendant Orkin Exterminating Company in 1952, under which Orkin was to exterminate insects and rodents in plaintiff's mill; that the insect and rodent situation became so bad that in August, 1955 Orkin sprayed with an insecticide known as Lindane. Thereafter, the Federal Food and Drug Administration and the State Health Department and the City of Houston made some investigation of the use of Lindane at the Rice Mill. All agencies finally in effect delegated to Inspector Moses of the Federal Food and Drug Administration the right to act for them. Inspector Moses told the Rice Mill that the use of Lindane had violated the law; that the Mill was in serious trouble; that the Mill could ship no rice; that such rice was unfit for human consumption; that the rice would be condemned; the buildings padlocked and the Mill and its offices subject to prosecution both civilly and criminally. Inspector Moses' (and the government's) position was that no amount of Lindane was permitted on rice; that no tolerance was established for it, and for that reason the rice was contaminated, and would

have to be remilled. The plaintiff Rice Mill relied on what Inspector Moses told it (speaking for the Federal, State and City Health Departments), and without contesting, disputing, or litigating, the validity or legality of the claims of Inspector Moses and/or the 3 Health Departments, plaintiff proceeded to remill the rice at an expense of some $46,245. and during such period lost profits which the jury found to be $40,000.

"As further pertinent, we note that the record reflects that some 95% of the plaintiff's rice was intended for export to a foreign country. The record further reflects that a great many samplings of the rice were tested for Lindane and that the results of such samplings ran from *none* up to 3.6 parts of Lindane per million parts of rice. It is further reflected that such amounts are not injurious to health, in any manner."

It is Orkin's contention that the facts in evidence pertaining to the negligence phase of the case are substantially the same as on the first trial, and that for such reason the specific findings of law made by the Waco Court are binding upon this Court as the law of the case. We think it unnecessary to set out such findings since they may be found on pages 771-772 of the Court's opinion. It is our view that there are some substantial differences between the evidence adduced at the first trial and at the second trial. Several medical witnesses testified on the first trial who did not testify on the second trial. The applicable ordinances of the City of Houston were not introduced on the first trial but were introduced on the second trial. On the second trial, there is no evidence that the City and State agencies delegated to Inspector Moses the right to act for them, although they may have agreed that Federal, State and City food laws have been violated. Other differences will appear in the course of this opinion.

Plaintiff asserts that the answers of the jury to the special issues submitted constitute findings against Orkin on both the contract and tort phases of the case. Plaintiff requested certain more specific issues with respect to breaches of contract by Orkin, which were refused by the trial court. Any error of the trial court in refusing such issues has not been preserved by plaintiff and cannot be considered by this Court. The special issues submitted are limited to the use and application of Lindane and do not encompass any damages resulting from infestation of the rice by insects or rodents.

The contract does not make specific mention of Lindane. It specifies the scope of work and controlled service to be rendered by Orkin, and with respect to material to be used provides: "The materials used shall conform to Federal, State and local ordinances and laws, and shall be acceptable to the rice milling industry." Plaintiff argues that Orkin in using Lindane violated the provisions of the contract and breached its implied warranty to use proper materials, and was guilty of violations of the Federal Food, Drug, & Cosmetic Act, in that (1) it violated 21 U.S.C. § 342(a) (2) since no amount of Lindane whatever was permitted on milled rice; and (2) it violated 21 U.S.C. § 342(a) (1) in that it contained a poisonous and deleterious substance "which may render" the rice injurious to health. Plaintiff further contends that the undisputed evidence also shows violations of the Pure Food laws of the State of Texas and violations of the City of Houston ordinances.

Our inquiry is limited to alleged violations of the contract in the use and application of Lindane and to determining whether there is any evidence supporting the

findings of the jury with respect thereto on either or both the contract and tort phases of the case. We are unable to say as a matter of law that Orkin breached its contract and implied warranty with respect to the infestation of the rice. In this respect we are in accord with the law of the case as determined by the Waco Court. But even if we were to hold that there were such breaches as a matter of law, we would still be unable to determine how much damage resulted therefrom in the absence of a jury finding, and no issues were submitted with respect to such damage, although there was some evidence that the rice would probably have been remilled because of the infestation regardless of the use of Lindane.

Plaintiff pleaded that the spraying of an insecticide or pesticide on plaintiff's rice, rendering it unfit for sale, was a violation of Sections 861-880 of the Houston City Ordinances of 1942. Section 868 of such Ordinances provides that for the purpose of Article IV, entitled "Pure Food & Drugs," an article shall be deemed adulterated (c) Food-(5) "If it contains any added poisons or other added deleterious ingredient which may render such article injurious to health * * *." Section 866 provides: "No person shall, within the City, manufacture for sale, have in his possession with intent to sell or exchange, any article of food or drugs which is adulterated or misbranded within the meaning of this article." Section 873 provides for prosecution and punishment for violations of the foregoing sections.

The record in this case reflects that Lindane is a poisonous or deleterious ingredient and that it was added to the rice by Orkin in blowing Lindane dust all over the rice in plaintiff's mill. It was not necessary to show that the

food containing an added poisonous or deleterious substance must affect the public health in order for it to be condemned. All that need be established is that the added poisonous or deleterious substance must be such as may render such article injurious to health. United States v. Lexington Mill & Elevator Co., 232 U.S. 399, 34 S.Ct. 337, 58 L.Ed. 658. There is substantial evidence showing that Lindane in any quantity on rice may render such article injurious to health. The jury's finding to Special Issue No. 2 finds support in the evidence. There is no assignment that any of the jury's findings are against the weight and preponderance of the evidence, and if there were such assignment, we could not consider it since defendant appeals from the court's refusal to grant an instructed verdict and judgment non obstante veredicto.

Plaintiff also pleaded that by spraying such rice and adulterating it and rendering it unfit for sale, Orkin violated Articles 4471 and 4472 of the Texas Revised Civil Statutes, and Articles 706, 707 and 717 of the Texas Penal Code. These provisions are substantially the same as those provided in the City of Houston ordinances. The violation of such statutes would subject plaintiff to criminal prosecution by the State, and to confiscation of the rice.

There is evidence in the record before us that Orkin applied Lindane to plaintiff's stores of rice, including both milled and unmilled rice. No claim for damages has been made by plaintiff for the unmilled rice, since it would necessarily have to be milled and milling would remove the Lindane.

The Waco Court on the record before it found in effect that there had been no violation of the Federal statutes relied upon by plaintiff. We think the record on this ap-

peal shows certain violations. Sec. 342 provides: "A food shall be deemed to be adulterated—(a) (1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health * * *; or (2) (A) if it bears or contains any added poisonous or added deleterious substance * * * which is unsafe within the meaning of section 346a * * *." The exceptions in Section 342(a) (2) (A) do not apply to milled rice and are inapplicable to the facts of this case. Section 346 with respect to tolerances for poisonous ingredients provides: "Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice shall be deemed to be unsafe for the purposes of the application of clause (2) (A) of section 342(a) of this title." The evidence and the record before us show that Lindane was not required in the production of rice and that its use could have been avoided. Indeed, Lindane had been used only once in connection with plaintiff's mill from 1940 to 1955, and then it was used without the knowledge of the plaintiff or the health authorities. From the time of the application in August, 1955 Lindane has not been used down to the date of the second trial in 1961. Moreover, no allowance or tolerance was established for the use of Lindane on milled rice.

Plaintiff asserts that on the second trial the evidence shows that Lindane was on all the samples of rice that were taken and analyzed, except one sample that had been remilled. Even if plaintiff is mistaken in such assertion, there is nevertheless evidence showing that a number of samples were taken and that the results of many samplings showed from 0.2 to 3.6 parts per million of Lindane, and that the addition of such parts of Lindane to milled rice may

render it injurious to health. Manifestly it would be impossible to segregate from the stores of contaminated milled rice in question some unknown quantity of rice that might not have had Lindane on it in such quantities.

[1, 2] Since no tolerance for Lindane on milled rice as applicable to the facts of this case had been established by the Secretary of Health, Education & Welfare, the addition of any amount of Lindane to such milled rice was in violation of Section 342 (a) (2) of the Federal Food, Drug, & Cosmetic Act, and especially so if it may have rendered the rice injurious to health. The Act in question is quite specific, as stated by the Supreme Court of the United States in the recent case of Flemming v. Florida Citrus Exchange, 358 U.S. 153, 79 S.Ct. 160, 3 L.Ed.2d 188:

> "Here again, in our construction of this explicit Act, we must be sensitive to what Congress has written, and recall that 'It is for us to ascertain—neither to add nor subtract, neither to delete nor to distort.' 62 Cases of Jam v. United States, 340 U.S. 593, 596, 71 S.Ct. 515, 518, 95 L.Ed. 566."

Section 3.41, Title 21, 1955, Code of Federal Regulations, provides: "(a) The amendment in clause (2) of section 402(a) of the Federal Food, Drug, and Cosmetic Act shall become effective on the dates specified for the following pesticide chemicals: * * * (2) Effective date October 31, 1955: * * * Lindane: * * * Grain (from treating storage bins)." On the second trial it was established that plaintiff had never had any treating storage bins. The 1954 amendment to Section 342(a) (2) as provided in Section 5 of the Act of July 22, 1954 as applicable to the facts of the case before us, became effective one year following the date of the enactment of the Act or on July

22, 1955, and was in full force and effect in August, 1955, when the Lindane was applied to plaintiff's rice. Section 120.1(e), Title 21, 1955, Code of Federal Regulations, entitled "Definitions, Interpretations, and Exemptions," provides in substance that the term "Raw agricultural commodities" does not include foods that have been processed, fabricated, or manufactured by cooking, freezing, dehydrating, *or milling*. Since plaintiff's grain had been milled and was not a raw agricultural commodity, no tolerance had been established for it. Therefore, the application of any amount of Lindane was prohibited since it would add to the milled rice a poisonous or deleterious substance that may be injurious to health as shown by the evidence adduced on the second trial.

At the time of the occurrence in question, the Federal Food, Drug, and Cosmetic Act, Section 381(d), 21 U.S. C.A., provided with respect to exports that a food intended for export shall not be deemed to be adulterated or misbranded if it accords to the specifications of the foreign purchaser, is not in conflict with the laws of the country to which it is intended for export, and is labeled on the outside of the shipping package to show that it is intended for export. "But if such article is sold or offered for sale in domestic commerce, this subsection shall not exempt it from any of the provisions of this chapter." While there is some evidence that as much as 95% of plaintiff's rice had been exported during some prior years, the evidence does not show that the rice in question was labeled for export or that it would necessarily be exported. It was held subject to sale in domestic markets as well as foreign markets. Furthermore, the undisputed testimony of plaintiff's general manager Smith who negotiated contracts with foreign buyers, was to the effect that he could not have sold to any foreign purchasers any rice containing Lindane.

[3] Defendant contends, however, that plaintiff voluntarily remilled its rice, and that it was not forced to do so by the Federal, State or City authorities. We think this contention is without merit. Under the evidence adduced on the second trial, it appears that plaintiff was placed in such position by Orkin that it could not keep the rice in its possession, sell or exchange the same without being subject to criminal prosecution and punishment under Section 873 of the Ordinances of the City of Houston, and under Article 717, Texas Penal Code. Additionally, the rice could be condemned, confiscated, forfeited and destroyed under Article 4470, Texas Revised Civil Statutes. The evidence shows that the State agency was prepared to take action if plaintiff's rice was sold or offered for sale with Lindane on it. Also, the shipment of such rice in interstate commerce would have subjected plaintiff to penalties under Sections 333 and 334 of the Federal Act. Having placed the plaintiff in the situation where it could neither retain nor sell the rice in question without violating the Pure Food laws of the City, State and Federal governments, and subjecting itself to prosecution and penalties, the defendant is not in a position to urge that plaintiff acted voluntarily and not under coercion in remilling the rice and thereby preventing such prosecution and penalties, and at the same time mitigating the damages which might have resulted from confiscation and destruction of the rice by the State or other governmental authority.

[4] The cases cited by defendant with respect to voluntary payments are inapplicable to the factual situation in the present case. The retention or sale or offer to sell the rice in question constituted a violation of law, making plaintiff's action necessary to avoid prosecution, penalties and seizure of the rice. Under these circumstances plain-

tiff's act in remilling the rice was not voluntary but coerced as a matter of law. Where one risks prosecution, penalties and forfeiture of his property for noncompliance with law, his act in complying cannot be said to be voluntary. National Biscuit Co. v. State, 134 Tex. 293, 135 S.W.2d 687; Crow v. City of Corpus Christi, 146 Tex. 558, 209 S.W.2d 922; District of Columbia v. American Security & Trust Co., 292 U.S.App.D.C. 33, 202 F.2d 21; St. John's Electric Co. v. City of St. Augustine, Fla., 81 Fla. 588, 88 So. 387; 17-A Amer. Jur. Duress and Undue Influence §§7, 14, p. 875; 21 Tex.Jur. 2d Duress & Coercion §2, p. 116.

[5] Plaintiff on its appeal complains that the trial court erred in excluding certain evidence relative to lost profits and in denying its motion for lost profits before judgment. We have been unable to find in the record any request by plaintiff for submission of any issue on lost profits as such. The answer of the jury to Special Issue No. 7 awarding damages in the sum of $15,000,00 for the loss of use of plaintiff's mill consumed in remilling the milled rice, necessarily includes lost profits. No judgment for lost profits in any other amount could have been entered without plaintiff's compliance with Rule 301, Texas Rules of Civil Procedure. There was no such compliance.

[6] Plaintiff has cited a number of cases in support of the rule that where a business is already established and making a profit, it is permissible to show the amount of business done in corresponding periods of time not too remote, and the rule that uncertainty of proof as to the amount of lost profit will not defeat recovery so long as there is no uncertainty as to the fact of legal damages. These general rules are not questioned by defendant. In the instant case plaintiff's witness was asked to give oral testi-

mony from some records as to the amount of rice purchased by plaintiff in October, November and December of 1953, to which question defendant objected because there had been no showing of any comparison between conditions during such period of time and the period of time in issue in this law suit. The objection was sustained. Plaintiff's witness was also asked whether he had an opinion as to the amount of rice he would have bought, to which question the defendant objected as not being based upon facts. No other evidence along such line was offered, although in its bill of exception in the jury's absence such witness testified that he thought "it would be reasonable to suppose" that they would have bought at least 100,000 additional barrels and that he thought "it is reasonable to suppose we would have made at least 50 cents a barrel." We cannot say that the court improperly excluded such testimony, but if there was any error in such connection, we think the exclusion was not harmful in view of all the records and testimony relative to earnings and profits of the business that were admitted in evidence.

[7] In its sixth Point, plaintiff asserts that the court erred in denying interest before judgment upon its damages. Plaintiff sued not only for its damages but for interest thereon as damages. It states in its brief that it continued to sustain damages until June 7, 1956. It is our view that the plaintiff is entitled as a matter of law to 6% interest as damages on the $36,246.32 from that date until date of judgment, such interest amounting to $12,239.17. The Texas Co. v. The State of Texas, 154 Tex. 494, 281 S.W. 2d 83; Watkins v. Junker, 90 Tex. 584, 40 S.W. 11; Tortuguero Logging Operation, Ltd. v. Houston, Tex. Civ. App., 349 S.W.2d 315; Ewing v. Wm. L. Foley, Inc., 115 Tex. 222, 280 S.W. 499, 44 A.L.R. 627.

[8] We think there is no merit in plaintiff's contention that it was entitled to a directed verdict or in its contention that the court erred in granting a partial summary judgment for defendant in connection with plaintiff's claim for gross negligence and exemplary damages. A careful review of the record shows that there is no evidence that would warrant submission of an issue in connection with alleged gross negligence on the part of the defendant.

The judgment of the Trial Court is reformed by adding thereto interest to date of judgment in the sum of $12,239.17, and, as reformed is affirmed.